

Montana Water Court
PO Box 1389
Bozeman, MT 59771-1389
1-800-624-3270
(406) 586-4364
watercourt@mt.gov

FILED
01/24/2023
Sara Calkins
CLERK
Montana Water Court
STATE OF MONTANA
By: D'Ann CIGLER
40K-0047-R-2022
White, Eugene
4.00

IN THE WATER COURT OF THE STATE OF MONTANA
LOWER MISSOURI DIVISION
WHITEWATER CREEK - BASIN (40K)
PRELIMINARY DECREE

CLAIMANTS: Arabelle M. McMullen Qtip Trust; Ray L.
McMullen

CASE 40K-0047-R-2022

40K 167578-00
40K 167584-00
40K 167585-00
40K 167586-00
40K 167587-00
40K 167588-00

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusions of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must serve a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

MASTER'S REPORT

The above-captioned claims appeared in the Preliminary Decree for the Lower Missouri River Division, Whitewater Creek. The claims did not receive objections or notices of intent to appear, but did receive issue remarks during the DNRC's claims reexamination.

FINDINGS OF FACT

1. Each of the claims received the following substantive issue remark from the DNRC:

THE CLAIMS LISTED AT THE END OF THE STATEMENT CLAIM THE SAME NOTICE OF APPROPRIATION. THE NOTICE DOES NOT SPECIFY A FLOW RATE. 40K 167584-00, 40K 167585-00, 40K 167586-00, 40K 167578-00, 40K 167587-00, 40K 167588-00.

2. On May 9, 2022, the Court set a filing deadline requiring the Claimants to work with the DNRC under §85-2-248(5), MCA to address the issue remarks on the claims.

3. On September 8, 2022, DNRC Water Resources Specialist Pam Weinmeister filed her *Memorandum* in this matter. Ms. Weinmeister's *Memo* states that she was contacted by claimant Ray McMullen on behalf of himself and as trustee of claimant Arabelle M. McMullen QTIP Trust on May 23, 2022, and by attorney Ed Amestoy on August 16, 2022 to discuss the issue remarks. In her *Memo*, Ms. Weinmeister states that after discussing the system, claim 40K 167578-00 has a dam for a point of diversion and a stock dam does not require a flow rate. Ms. Weinmeister further states that the remaining claims are part of a direct flow water spreading irrigation system which also does not require a flow rate. The *Memo* goes on to note that the DNRC recommends the removal of the above-listed issue remark on each of the claims.

4. Each claim also received notice-type issue remarks from the DNRC during its reexamination of claims. The remarks state that is no objections are filed, the remarks should be removed. No objections were filed.

PRINCIPLES OF LAW

1. A properly filed Statement of Claim for an existing water right is prima facie proof of its content. Section 85-2-227, MCA; Rule 10, W.R.Adj.R.
2. Prima facie proof may be contradicted and overcome by a preponderance of the evidence. Rule 19, W.R.Adj.R.
3. A preponderance of the evidence is evidence that shows a fact is “more probable than not.” *Hohenlohe v. State*, 2010 MT 203, ¶ 33, 357 Mont. 438, 240 P.3d 628.
4. If prima facie status is overcome, the burden shifts back to the claimant to demonstrate historical use. *79 Ranch v. Pitsch*, 204 Mont. 426, 432-33, 666 P.2d 215, 218 (1983).
5. Section 85-2-248(2), MCA, requires that the Water Court resolve all issue remarks that are not resolved through the objection process. *See also* Rule 7, W.R.Adj.R.
6. The Water Court may use information submitted by the DNRC, the Statement of Claim, and any other data obtained by the Court to evaluate a water right. Sections 85-2-227, -231(2), MCA.
7. When resolving issue remarks, the Water Court must weigh the information resulting in the issue remark and the issue remark against the claimed water right. Section 85-2-247(2), MCA. The factual evidence on which an issue remark is based must meet the preponderance of evidence standard before the prima facie status of a claim is overcome. 43Q 200996-00 et al., Order Establishing Volume and Order Closing Case, at 18, June 8, 2015.

CONCLUSIONS OF LAW

1. The evidence in the record is sufficient to resolve the issue remarks placed on the above-captioned claims.
2. The additional information and subsequent recommendations provided in Ms. Weinmeister’s *Memo* resolve the issue remarks appearing on the claims. The flow rate issue remarks should be removed from each of the claims.

3. The notice-type issue remarks appearing on each claim served their notice purpose and should be removed from the claims.

RECOMMENDATIONS

Based on the foregoing Findings of Fact and Conclusions of Law, this Master recommends that the Court adopt the changes as outlined above.

Post decree abstracts of the water right claims reflecting the recommended changes are attached to this Report.

ELECTRONICALLY SIGNED AND DATED BELOW.

Service via USPS Mail:

Arabelle M. McMullen Qtip Trust
Ray L. McMullen
4163 McMullen Rd.
Whitewater, MT 59544-9604

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
WHITEWATER CREEK
BASIN 40K**

Water Right Number: 40K 167578-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: RAY L MCMULLEN
4163 MCMULLEN RD
WHITEWATER, MT 59544 9604

MCMULLEN, ARABELLE M QTIP TRUST
4163 MCMULLEN RD
WHITEWATER, MT 59544 9604

Priority Date: DECEMBER 31, 1935

Type of Historical Right: FILED

Purpose (use): STOCK

Flow Rate: A SPECIFIC FLOW RATE HAS NOT BEEN DECREED FOR THIS USE FROM THIS ONSTREAM RESERVOIR. THE FLOW RATE IS LIMITED TO THE MINIMUM AMOUNT HISTORICALLY NECESSARY TO SUSTAIN THIS PURPOSE.

Volume: THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCK WATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

Source Name: INTERIOR DRAINAGE

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SESENE	18	36N	31E	PHILLIPS

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: DAM

Reservoir: ONSTREAM

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	SESENE	18	36N	31E	PHILLIPS

Diversion to Reservoir: DIVERSION # 1

Period of Use: JANUARY 1 TO DECEMBER 31

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			SESENE	18	36N	31E	PHILLIPS

Remarks:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE MULTIPLE USES OF THE SAME RIGHT. THE USE OF THIS RIGHT FOR SEVERAL PURPOSES DOES NOT INCREASE THE EXTENT OF THE WATER RIGHT. RATHER IT DECREES THE RIGHT TO ALTERNATE AND EXCHANGE THE USE (PURPOSE) OF THE WATER IN ACCORD WITH HISTORICAL PRACTICES.

167578-00

167588-00

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
WHITEWATER CREEK
BASIN 40K**

Water Right Number: 40K 167584-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: RAY L MCMULLEN
4163 MCMULLEN RD
WHITEWATER, MT 59544 9604

MCMULLEN, ARABELLE M QTIP TRUST
4163 MCMULLEN RD
WHITEWATER, MT 59544 9604

Priority Date: DECEMBER 31, 1935

Type of Historical Right: FILED

Purpose (use): IRRIGATION

Irrigation Type: WATER SPREADING

Flow Rate: NO FLOW RATE HAS BEEN DECREED BECAUSE THIS USE CONSISTS OF DIRECT FLOW WATER SPREADING.

***Volume:** 20.00 AC-FT

Climatic Area: 2 - MODERATELY HIGH

Maximum Acres: 10.00

Source Name: UNNAMED TRIBUTARY OF INTERIOR DRAINAGE

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SWNWSE	7	36N	31E	PHILLIPS

Period of Diversion: APRIL 1 TO SEPTEMBER 30

Diversion Means: DIVERSION DAM

Period of Use: APRIL 1 TO SEPTEMBER 30

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	6.00		SWNWSE	7	36N	31E	PHILLIPS
2	4.00		NWSWSE	7	36N	31E	PHILLIPS
Total:	10.00						

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
WHITEWATER CREEK
BASIN 40K**

Water Right Number: 40K 167585-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: RAY L MCMULLEN
4163 MCMULLEN RD
WHITEWATER, MT 59544 9604

MCMULLEN, ARABELLE M QTIP TRUST
4163 MCMULLEN RD
WHITEWATER, MT 59544 9604

Priority Date: DECEMBER 31, 1935

Type of Historical Right: FILED

Purpose (use): IRRIGATION

Irrigation Type: WATER SPREADING

Flow Rate: A SPECIFIC FLOW RATE HAS NOT BEEN DECREED BECAUSE THIS USE CONSISTS OF DIRECT FLOW WATER SPREADING.

Volume: 17.60 AC-FT

Climatic Area: 2 - MODERATELY HIGH

Maximum Acres: 11.00

Source Name: UNNAMED TRIBUTARY OF INTERIOR DRAINAGE

Source Type: SURFACE WATER

POTHOLE LAKE

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Tw</u>	<u>Rge</u>	<u>County</u>
1		E2NESE	7	36N	31E	PHILLIPS

Period of Diversion: APRIL 1 TO SEPTEMBER 30

Diversion Means: DIKE

Period of Use: APRIL 1 TO SEPTEMBER 30

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Tw</u>	<u>Rge</u>	<u>County</u>
1	11.00		NESE	7	36N	31E	PHILLIPS

Total: 11.00

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
WHITEWATER CREEK
BASIN 40K**

Water Right Number: 40K 167586-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: RAY L MCMULLEN
4163 MCMULLEN RD
WHITEWATER, MT 59544 9604

MCMULLEN, ARABELLE M QTIP TRUST
4163 MCMULLEN RD
WHITEWATER, MT 59544 9604

Priority Date: DECEMBER 31, 1935

Type of Historical Right: FILED

Purpose (use): IRRIGATION

Irrigation Type: WATER SPREADING

Flow Rate: A SPECIFIC FLOW RATE HAS NOT BEEN DECREED BECAUSE THIS USE CONSISTS OF DIRECT FLOW WATER SPREADING.

Volume: 8.00 AC-FT

Climatic Area: 2 - MODERATELY HIGH

Maximum Acres: 5.00

Source Name: UNNAMED TRIBUTARY OF INTERIOR DRAINAGE

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SWNWSE	7	36N	31E	PHILLIPS

Period of Diversion: APRIL 1 TO SEPTEMBER 30

Diversion Means: DIVERSION DAM

Period of Use: APRIL 1 TO SEPTEMBER 30

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	1.00		SWNESE	7	36N	31E	PHILLIPS
2	4.00		SENESE	7	36N	31E	PHILLIPS

Total: 5.00

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
WHITEWATER CREEK
BASIN 40K**

Water Right Number: 40K 167587-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: RAY L MCMULLEN
4163 MCMULLEN RD
WHITEWATER, MT 59544 9604

MCMULLEN, ARABELLE M QTIP TRUST
4163 MCMULLEN RD
WHITEWATER, MT 59544 9604

Priority Date: DECEMBER 31, 1935

Type of Historical Right: FILED

Purpose (use): IRRIGATION

Irrigation Type: WATER SPREADING

Flow Rate: A SPECIFIC FLOW RATE HAS NOT BEEN DECREED BECAUSE THIS USE CONSISTS OF DIRECT FLOW WATER SPREADING.

Volume: 4.00 AC-FT

Climatic Area: 2 - MODERATELY HIGH

Maximum Acres: 5.00

Source Name: INTERIOR DRAINAGE

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NWSWSE	7	36N	31E	PHILLIPS

Period of Diversion: JANUARY 1 TO DECEMBER 30

Diversion Means: DAM

Reservoir: ONSTREAM

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	NWSWSE	7	36N	31E	PHILLIPS

Diversion to Reservoir: DIVERSION # 1

Period of Use: APRIL 1 TO SEPTEMBER 30

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	5.00		NENWNE	18	36N	31E	PHILLIPS

Total: 5.00

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
WHITEWATER CREEK
BASIN 40K**

Water Right Number: 40K 167588-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: RAY L MCMULLEN
4163 MCMULLEN RD
WHITEWATER, MT 59544 9604

MCMULLEN, ARABELLE M QTIP TRUST
4163 MCMULLEN RD
WHITEWATER, MT 59544 9604

Priority Date: DECEMBER 31, 1935

Type of Historical Right: FILED

Purpose (use): IRRIGATION

Irrigation Type: WATER SPREADING

Flow Rate: A SPECIFIC FLOW RATE HAS NOT BEEN DECREED BECAUSE THIS USE CONSISTS OF DIRECT FLOW WATER SPREADING.

Volume: 16.00 AC-FT

Climatic Area: 2 - MODERATELY HIGH

Maximum Acres: 10.00

Source Name: INTERIOR DRAINAGE

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SESENE	18	36N	31E	PHILLIPS

Period of Diversion: APRIL 1 TO SEPTEMBER 30

Diversion Means: DAM

Period of Use: APRIL 1 TO SEPTEMBER 30

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	5.00		SWNESE	18	36N	31E	PHILLIPS
2	5.00		NWNESE	18	36N	31E	PHILLIPS
Total:	<u>10.00</u>						

Remarks:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE MULTIPLE USES OF THE SAME RIGHT. THE USE OF THIS RIGHT FOR SEVERAL PURPOSES DOES NOT INCREASE THE EXTENT OF THE WATER RIGHT. RATHER IT DECREES THE RIGHT TO ALTERNATE AND EXCHANGE THE USE (PURPOSE) OF THE WATER IN ACCORD WITH HISTORICAL PRACTICES.

167578-00

167588-00